2015

Aspenwood Real Estate Corporation, Elite Legacy Corporation, and Hilary "Skip" Wing, Plaintiff/Appellees, vs. Charles "Chuck" Schvaneveldt Defendant/Appellant.

Utah Court of Appeals

THE UTAH COURT OF APPEALS

ASPENWOOD REAL ESTATE CORPORATION, ELITE LEGACY CORPORATION, and HILARY "SKIP" WING,

Plaintiffs/Appellees,

vs.

CHARLES "CHUCK" SCHVANEVELDT

Defendant/Appellant.

BRIEF OF APPELLEES ASPENWOOD, ELITE LEGACY, AND SKIP WING

APPELLATE CASE NO. 20140978-CA

DISTRICT CASE NO. 060906802

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PARTIES

Elite Legacy Corporation;
Aspenwood Real Estate Corporation;
and Hilary "Skip" Wing,

Plaintiffs,

v.

Still Standing Stables, LLC;
Chuck Schvaneveldt; and
Cathy Code,

Defendants.

Emmett Warren, LC; and
WBL Development LLC,

Respondent, Crossclaim Plaintiff, and Third-Party Plaintiff,

v.

Still Standing Stables, LLC; and
Chuck Schvaneveldt,

Third-Party Defendants, Third-Party Plaintiffs,

v.

Skip Wing;
Shane Thorpe;
Scott Quinney;
Tim Shea;
Aspenwood Realty, LLC;
ReMax Realty; and
Aspenwood Elite Legacy Corporation,

Third-Party Defendants.

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JURISDICTIONAL STATEMENT

Jurisdiction existed in the district court under Utah Code § 78A-5-102(1). Appellate jurisdiction exists under Utah Code § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

ISSUE NO. 1: Evidence not considered in the district court cannot be considered on appeal. Chuck's appeal relies entirely on evidence that the district court deemed untimely and refused to consider. The court deemed the evidence untimely because it was available the day the lawsuit was filed but was not offered until six years after litigation began and nearly a year after trial. Can Chuck's appeal prevail where there is no evidence available on appeal to support it?

Standard of Review for Issue No. 1: Challenges to standing are reviewed using the standard for a dispositive motion at the relevant stage of litigation.[1] Legal determinations regarding standing are reviewed for correctness, but factual findings underlying jurisdictional issues are reviewed for clear error.[2] In addition, jurisdiction is presumed after a judgment has been entered, and the burden of demonstrating a lack of jurisdiction lies with the party attacking jurisdiction.[3]

Preservation: Chuck's standing argument was not preserved. While standing is a jurisdictional issue that cannot be waived, for all intents and purposes Chuck waived this particular standing argument by failing to timely offer evidence to support it. Evidence supporting this argument was not offered until nearly a year after trial and the district

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[1] *Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 15, 228 P.3d 747.
[2] *Miles v. Miles*, 2011 UT App 359, ¶ 6, 269 P.3d 958 (internal citations omitted).
[3] *Id.*

court refused to consider it.[4]

In addition, Chuck did not preserve the majority of the remaining arguments he raises on appeal. In the lower court, Chuck requested relief from judgment under Rule 60(b)(4) through 60(b)(6) only and based each corresponding argument on evidence that the court deemed untimely and refused to consider. All other arguments were not preserved.

CONSTITUTIONAL AND STATUTORY PROVISIONS

(1)(a) A person may not bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation, for any act done or service rendered if the act or service is prohibited under this chapter.

(b) Except as provided in Subsection (1)(a), a person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation if the person is:

(i) a principal broker;

(ii) an individual that was licensed as a principal broker at the time the act or service that is the subject of the lawsuit was performed; or

(iii) an entity that, under the records of the Division of Real Estate, is affiliated with a principal broker.

(2)(a) A sales agent or associate broker may not sue in that individual's own name for the recovery of a fee, commission, or compensation for services as a sales agent or associate broker unless the action is against the principal broker with whom the sales agent or associate broker is or was affiliated.

(b) An action for the recovery of a fee, commission, or other compensation may only be instituted and brought by the principal broker with whom a sales agent or associate broker is affiliated.[5]

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[4] *See* pp. 7–20, *infra.*

[5] Utah Code Ann. § 61-2f-409 (2015).

STATEMENT OF THE CASE

NATURE OF THE CASE, STATEMENT OF FACTS, AND COURSE OF PROCEEDINGS

This appeal arises out of a real estate brokerage's attempt to collect a commission. The real estate brokerage consists of Aspenwood Real Estate Corporation, Elite Legacy Corporation, and Skip Wing as their principal broker (this brief refers to these parties collectively as Aspenwood or the Aspenwood Plaintiffs). Aspenwood alleged that it entered into a For-Sale-By-Owner Commission Agreement with the defendants Still Standing Stable, LC, Chuck Schvaneveldt, and Cathy Code, and that Aspenwood earned a commission under that FSBO agreement.

The real estate agent representing Aspenwood in the transaction was Tim Shea.[6] At the time the FSBO was signed, Shea worked for Aspenwood Real Estate Corporation, which was doing business as Remax Elite with Skip Wing as the principal broker.[7] Aspenwood Real Estate later became Elite Legacy Corporation, which also did business as Remax Elite with Skip Wing as the principal broker.[8] Skip has since retired,[9] while Tim has moved to Colorado.[10] Both Aspenwood Real Estate and Elite Legacy have ceased operating and will conclude their winding up phase as soon as this litigation ends.[11]

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[6] *E.g.*, R. at 8385, pp. 128:16–129:6, 175:18–24.
[7] R. at 8384, pp. 163:15–17, 164:19–165:21, 183: 12–15; 8385, pp. 87:15–88:2.
[8] R. at 8384, pp. 164:19–165:26.
[9] R. at 8384, p. 164:13–18.
[10] R. at 8385, p. 86:12–13.
[11] *See* R. at 1092; 1483–85.

1.1 The commission claim's factual background

In September, 1998, Still Standing bought a property located in Weber County (the Property).[12] Around early 2006, Chuck began making efforts to sell the Property.[13] A real estate agent working for Aspenwood, Tim Shea, approached Chuck with potential buyers for the Property.[14]

In February, 2006, Shea and Chuck entered into a For-Sale-By-Owner Commission Agreement.[15] Under that FSBO Agreement, Chuck agreed to pay a commission equal to 3% of the purchase price if he accepted an offer to purchase the Property.[16] Shea signed the FSBO as an agent of Remax Elite.[17] About two weeks later, Chuck signed a REPC and accepted an offer to purchase the Property.[18]

As the closing date approached, Chuck indicated that he would be providing a special warranty deed at closing, not a general warranty deed as required by the REPC.[19] The special warranty deed would not guarantee access to the Property.[20]

After learning that Chuck would not fulfill his contractual obligation to provide a general warranty deed, the Buyer decided not to go through with the deal.[21] Nevertheless,

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[12] R. at 2900.
[13] R. at 8385, pp. 87:1–92:18.
[14] R. at 8385, pp. 92:2–95:13.
[15] Cathy Code signed the FSBO on Chuck's behalf, and the jury found that Chuck ratified that signature. R. at 5388–89.
[16] *Id.*, ¶ 2.
[17] *Id.*
[18] Br. of Appellant, Ex. 2, § 25.
[19] R. at 2913–15; 8385, pp. 135:17–136:19, 187:17–188:3.
[20] R. at 2913–15.
[21] *Id.*

Chuck attempted to complete the transaction by showing up at closing and signing the closing documents.[22]

1.2 The commission claim's procedural history

In November, 2006, "Remax Elite" (a dba designation) filed a petition seeking declaratory relief regarding whether Remax Elite should deliver earnest money to the buyer or the seller after the failed real estate transaction.[23] Nearly two years later, Remax Elite asserted a claim against Still Standing, Chuck, and Cathy claiming that Remax had earned a commission under the FSBO.[24]

The Defendants tenaciously opposed Remax's capacity to sue them, claiming in at least eight pretrial motions that "Remax Elite," as nothing more than a dba designation, did not have standing to sue.[25] Specifically, the Defendants argued that "Remax Elite" was an expired dba (thus violating the assumed-name statute)[26] and that only Remax Elite's principal broker Skip Wing had standing to recover the commission.[27] At one point, Chuck even submitted a summary judgment motion asserting as undisputed fact that Skip Wing was Remax Elite's principal broker and the only principal broker involved in the transaction.[28]

The Defendants' efforts to dismiss the case under their "expired dba" argument

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[22] R. at 367.
[23] R. at 1–4.
[24] R. at 660–64.
[25] R. at 1256–83; 1407–62; 2068–104; 2120–36; 2390–414; 2548–53; 2614–22; 2653–60.
[26] *E.g.*, R. at 2400–03.
[27] *E.g.*, R. at 1256–83; 1407–62; 2068–104; 2120–36; 2390–414; 2548–53; 2614–22; 2653–60.
[28] R. at 1408.

included investigating the Remax Elite dba's registration documents. For example, Chuck argued in a summary judgment motion and a motion requesting mediation that the FSBO commission claim should be dismissed due to expiration of the Remax Elite dba.[29] To support his assertion that the dba had expired, Chuck attached corresponding registration documents he accessed from the Utah Department of Commerce.[30]

Eventually the "expired dba" argument and other motions regarding standing were resolved by adding the Aspenwood Plaintiffs (i.e., Aspenwood Real Estate Corporation, Elite Legacy Corporation, and their principal broker Skip Wing).[31] After Aspenwood was added, the Defendants abandoned their standing arguments voluntarily.[32] The case then proceeded to trial, where Aspenwood prevailed against Chuck while both Still Standing and Cathy were dismissed.[33]

After trial, the court turned to resolution of the parties' claims for attorney fees. During the dispute over attorney fees, Skip asserted that he was involved in the case as a representative only and therefore should not be personally liable for Cathy Code's award of attorney fees.[34] This included pointing out to the court that Skip had never signed the FSBO; Shea signed it on behalf of Remax Elite.[35] Because Skip was not a party to the FSBO, he asserted that he could not be personally liable under the FSBO's attorney-fee

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[29] *E.g.*, R. at 2123–24; 2400–03.
[30] R. at 1451; 2134–36; 2411–12.
[31] R. at 3591–604.
[32] R. at 7015.
[33] R. at 5423–25; 5388–89; 5613–14.
[34] R. at 6780–90.
[35] R. at 6783–86.

provision.[36]

In a complete surprise to Aspenwood, pointing out the innocuous and obvious fact that Skip never signed the FSBO triggered over a year and a half of post-trial litigation. According to Chuck, this "admission" from Aspenwood somehow spurred him to investigate who owned the Remax Elite dba,[37] despite the fact that the dba's status had "vexed the entire litigation"[38] and Chuck had already looked up the dba's registration documents nearly three and a half years earlier.[39]

1.3 The flood of post-trial Quinlan motions

Chuck's belated inquiry into the registration documents convinced him that Dale Quinlan was somehow involved in the failed real estate transaction.[40] Thus ten months after the trial ended Chuck submitted a motion to dismiss based on this previously unreferenced Quinlan evidence.[41] Chuck suggested that Quinlan had owned the Remax Elite dba at the time Chuck signed the FSBO, and therefore Chuck was somehow contracting with Quinlan rather than Aspenwood.[42] The district court responded to this motion harshly: "This is precisely the type of cumulative and unnessary [sic] motion that justified the significant attorney fees awarded in this case, and caused this case to languish on the court's docket for years."[43]

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[36] *Id.*
[37] Br. of Appellant, 8–9.
[38] *Id.*, 9.
[39] R. at 1451; 2134–36; 2400–03; 2411–12.
[40] R. at 6867–72.
[41] R. at 6864–66
[42] R. at 6867–72.
[43] R. at 7012. Addendum, Ex. A.

This motion turned out to be the first of several "cumulative and unnecessary" motions based on the Quinlan evidence. In the end, Chuck filed six post-trial motions—each relying on nearly identical "facts" and legal arguments.[44] Chuck pursued these motions one after another under every conceivably applicable rule of civil procedure. Resolving them took a year and a half.[45]

While this appeal concerns only the fourth of these six motions, the resolution of all six motions matters here, for two reasons: 1) the Court refused in each instance to admit the Quinlan evidence, making that evidence unavailable for appeal; and 2) the order that Chuck appeals relied on rulings and findings in the previous post-trial orders.

1.3.1 The first post-trial Quinlan motion

Chuck's first post-trial motion claimed that the new Quinlan evidence showed that Quinlan had originally owned the Remax Elite dba.[46] According to Chuck, this somehow made Quinlan Remax Elite's principal broker and the only party entitled to seek the FSBO commission.[47]

The district court absolutely refused to consider the untimely Quinlan evidence: "Raising this question of fact concerning the standing of the plaintiffs at this late date is unwarranted. . . . Raising new factual issues nearly a year after a jury trial and six months after entry of judgment will not be permitted."[48]

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[44] R. at 6864–66; 6987–93; 7088–90; 7287–93; 7876–91; 8110–22.
[45] The first Quinlan motion was filed on June 28, 2013 (R. at 6864–66) and the final Quinlan motion was resolved in an order entered December 29, 2014 (R. at 8452–54).
[46] R. at 6867.
[47] R. at 6869–71.
[48] R. at 7013. Ex. A.

In reaching its decision, the court faulted Chuck for failing to explain why he had failed to discover the Quinlan evidence earlier: "Even if this motion were timely, [Chuck] has provided no explanation for why this new evidence could not have been discovered in time for a Rule 59 motion."[49] In addition—and making Chuck's burden on appeal much more difficult to overcome—the court made this critical factual finding: "It is beyond belief that [Chuck] could not have discovered this evidence with due diligence."[50]

And the court did not stop there. It also noted that even if the Quinlan evidence were considered, that evidence was irrelevant: Skip Wing, not Dale Quinlan, was the principal broker associated with the FSBO.[51] Further, the court found that both Aspenwood Real Estate Corporation and Elite Legacy Corporation owned the Remax Elite dba.[52] Finally, the court ruled that Chuck had waived his allegations of forgery and fraud because he had failed to raise them earlier in the litigation.[53]

Based on its refusal to consider the new evidence and its other findings and rulings, the court denied the motion.[54] The court concluded its order by stating "The court is satisfied that this case is closed."[55] Chuck has not appealed any ruling associated with this first motion.

1.3.2 The second post-trial Quinlan motion

Three weeks after Chuck filed his first post-trial motion to dismiss, Chuck and

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[49] *Id.*
[50] *Id.*
[51] R. at 7013–14. Ex. A.
[52] R. at 7015. Ex. A.
[53] R. at 7014. Ex. A.
[54] R. at 7016. Ex. A.
[55] R. at 7017. Ex. A.

Still Standing filed a second motion to dismiss based on a purported settlement agreement.[56] This motion claimed that Quinlan and the Defendants had reached a settlement agreement regarding the FSBO commission.[57]

Again, the district court absolutely refused to consider the Quinlan evidence: [T]his court cannot consider new evidence from Defendants after a final judgment . . . ."[58] Moreover, the court found that Chuck once again had failed to explain why he could not have discovered the Quinlan evidence earlier.[59] The court called this failure a "fatal flaw" to considering the Quinlan evidence.[60]

For these two reasons, the court denied the motion.[61] In addition, the court denied the motion on the ground that the purported settlement claim did not mandate dismissal:

> [E]ven if this motion were not time barred and Defendants did have some reasonable excuse why they could not discover this new evidence earlier, settling a claim that could be raised by a third party does not per se indicate that the plaintiffs in this case did not have standing to assert their claims. At best the new evidence would raise a material question of fact concerning proper ownership of the commission claim.[62]

This order, like the first order dealing with Quinlan issues, concluded by stating "The court is satisfied that this case is closed."[63] Chuck has not appealed any ruling associated with this second motion.

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[56] R. at 6987–93.
[57] *Id.*
[58] R. at 7147.
[59] R. at 7148. Addendum, Ex. B.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

1.3.3 The third post-trial Quinlan motion

Three weeks after filing the second motion, Chuck submitted a third motion based on the Quinlan evidence.[64] In this third motion, Chuck asked the court under Rule 52 to amend the findings in the final judgment, asserting that the judgment should be revised to reflect that Dale Quinlan owned the Remax Elite dba and was therefore the contracting party in the FSBO.[65]

In response, the district court refused a third time to consider the Quinlan evidence: "[T]he Court's ruling is that there is no latitude under Rule 52 to consider new evidence."[66] In reaching its conclusion, the court found—for the third time—that Chuck could have discovered the Quinlan evidence with due diligence:

> [T]he information, specifically the documentation from the Department of Corporations, and . . . challenges with respect to the validity or invalidity of signatures, and whether or not they're forged or have been cut and pasted, *all of those kinds of things were information that could, by reasonable diligence, have been discovered and determined well before a trial was conducted in this case.*[67]

Once again, the court did not simply dismiss the motion based on exclusion of the Quinlan evidence and Chuck's lack of diligence. Here, the court also pointed out that even if the Quinlan evidence were considered, the court was required to construe that evidence in favor of the judgment.[68] Indeed, the court proceeded to rule on this issue, stating that it construed the evidence in a way that supported the judgment: considering

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[64] R. at 7088–90.
[65] R. at 7093–104.
[66] R. at 8238. Addendum, Ex. C.
[67] R. at 8237. Ex. C.
[68] R. at 8238–42. Ex. C.

all the evidence, Quinlan was an employee and agent for the plaintiff corporations and Quinlan's involvement with the dba was limited to his capacity as an employee or representative of the true owners, the business entities.[69] Chuck has not appealed any ruling associated with this third motion.

1.3.4 The fourth post-trial Quinlan motion (Rule 60(b))

One month after submitting the third motion, Chuck submitted a fourth motion, this time requesting relief from judgment under Rule 60(b).[70] This is the motion before the Court on appeal. Here Chuck asserted that Dale Quinlan, as the purported owner of the Remax Elite dba, was the only party entitled to pursue the FSBO commission; therefore the plaintiffs never had standing to pursue the commission claim and the claim had been settled between Quinlan and the Defendants.[71]

Chuck's argument focused on Rule 60(b) subsections 4 through 6.[72] While the motion itself states that it requests relief under subsections two through six,[73] Chuck's supporting memorandum provided analysis and argument regarding subsections four through six only.[74] Indeed, the court expressly noted in both its oral ruling and written order that Chuck did not request relief under 60(b)(2), the subsection allowing relief based on newly discovered evidence.[75] In addition, because Chuck did not raise Rule 60(b)(3) as a ground for relief the district court did not address Rule 60(b)(3) in its oral

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[69] R. at 8241–42. Ex. C.
[70] R. at 7287–94.
[71] R. at 7311–18.
[72] R. at 7314–19; 8256.
[73] R. at 7291–92.
[74] R. at 7314–19.
[75] R. at 8255–56; 8446 pp. 46:24–47:16.

ruling or written order.[76]

In his supporting memorandum, Chuck acknowledged that the court had earlier excluded the corresponding Quinlan evidence based on timeliness, stating that he filed this motion "to put the facts and law squarely before the Court for a ruling on the record."[77] Chuck claimed this motion was timely for three reasons. First, Chuck stressed that he had filed the Rule 60 motion within three months of the final judgment, which would make the motion timely under subsections (1) through (3).[78] Second, Chuck claimed (without elaboration) that the motion was brought within a reasonable time because he had exercised due diligence throughout discovery.[79] Third, Chuck blamed Aspenwood for his failure to learn of Quinlan's purportedly critical involvement with the FSBO.[80]

Notably, Chuck provided no legal argument, analysis, or citation to authority regarding whether Aspenwood's allegedly fraudulent acts justified relief from judgment under Rule 60(b)(3).[81] Instead, Chuck raised these issues solely to establish that his motion was timely and properly before the court.[82]

After arguing that the motion was properly before the court, Chuck then requested relief from the judgment under 60(b)(5), asserting that the judgment against him had been

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[76] R. at 8254–69; 8446 pp. 45:6–58:5.
[77] R. at 7294.
[78] R. at 7311–13.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

satisfied.[83] Chuck's analysis on this point was less than clear, but his argument boiled down to this:

- Dale Quinlan owned the Remax Elite dba at the time the FSBO was signed, therefore Quinlan was Remax Elite and the "true party to the FSBO."
- The FSBO requires Remax Elite (i.e., Quinlan) to mediate before proceeding to litigation.
- Quinlan mediated with the Defendants and settled his purported right to the commission.
- Because the party that was truly entitled to the commission claim (Quinlan) settled that claim, the judgment had been satisfied.[84]

Next Chuck requested relief from the judgment under 60(b)(4) because Aspenwood had allegedly failed to prove that it had standing.[85] This argument was essentially identical to Chuck's argument under 60(b)(5):

- Dale Quinlan owned the Remax Elite dba at the time the FSBO was signed, therefore Quinlan was the "only Remax contracting party when the FSBO was signed."
- Because Quinlan was "the only Remax contracting party," only Quinlan had the right under the FSBO to pursue a commission.
- Quinlan never transferred his ownership of the dba or the commission claim to Aspenwood, and documents purporting to transfer the dba were fraudulent.
- Because only Quinlan had the right to pursue the commission and never transferred that right to Aspenwood, Aspenwood did not have standing to pursue the commission. [86]

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[83] R. at 7314.
[84] *Id.*
[85] R. at 7315–18.
[86] *Id.*

Finally, Chuck turned to Rule 60(b)(6), the rule's catch-all provision.[87] Once again, Chuck's argument here was somewhat hard to follow. But Chuck's first point under 60(b)(6) apparently did not request relief from the commission judgment at all, but concerned earlier rulings dismissing Chuck's claims against the real estate agent Tim Shea: "Seller's side should be allowed to supplement earlier motions with testimony from Dale Quinlan to explain why Seller's side was damaged by the conduct of an incompetent agent and broker . . . . Dale Quinlan could testify regarding the duties of the agent."[88]

Chuck's second (and final) point under 60(b)(6) mostly repeated his earlier arguments:

- Quinlan—not Aspenwood—was the true FSBO contracting party.
- The FSBO required the parties to mediate before going to court.
- Quinlan never participated in mediation.
- As a result, the mediation provision had never been complied with.
- This violation of the mediation provision required dismissal of Aspenwood's claim.[89]

Thus, while Chuck's motion mentioned 60(b)(2) (new evidence) and (3) (fraud), as grounds for relief, Chuck's supporting memorandum provided no supporting legal authority, legal argument, or analysis concerning why he was entitled to relief under these subsections.[90] And while Chuck did provide some legal argument under subsections four through six, those arguments were essentially identical, each presupposing that the

[87] R. at 7318–19.
[88] R. at 7318.
[89] R. at 7319.
[90] R. at 7310–20.

Quinlan evidence was admitted, that the Quinlan evidence was undisputed, and that the Quinlan evidence somehow established Quinlan as a party to the FSBO and the true claimholder.[91]

The Quinlan evidence that Chuck offered to support his 60(b) motion consisted of four exhibits containing these documents:

- an affidavit from Quinlan stating that he had never transferred his rights under the FSBO to Aspenwood;[92]
- a purported settlement agreement between Quinlan and the Defendants settling the FSBO commission claim;[93]
- an "Expert Forgery Report" (offered years after the expert discovery deadline) purporting to establish that Quinlan's transfer of the Remax Elite dba to Aspenwood was based on forged signatures;[94] and
- a letter from the Division of Corporations and Commercial Code dated December 11, 2013 (filed after briefing as a "Supplemental Exhibit"), stating that the ownership of the Remax Elite dba has been returned to Dale Quinlan.[95]

Aspenwood responded to this fourth attempt to introduce the Quinlan evidence by arguing that the motion could be resolved entirely under 60(b)(2), i.e., the subsection allowing relief based on new evidence that could not have been discovered earlier with due diligence.[96] Where Chuck's entire argument rested on the new Quinlan evidence, Chuck's motion could prevail only under 60(b)(2).[97]

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[91] R. at 7314–20.
[92] R. at 7327–31.
[93] R. at 7322–25.
[94] R. at 7333–51.
[95] R. at 7731–37.
[96] R. at 7454–57.
[97] *Id.*

Aspenwood also argued that the Quinlan evidence should not be considered because Chuck did not exercise due diligence searching for the Quinlan evidence.[98] Chuck had approximately six years to conduct discovery before trial.[99] The documents showing Quinlan's involvement with the Remax Elite dba were a matter of public record, and could have been discovered the day the lawsuit was filed.[100] Aspenwood also pointed out that Chuck had failed to identify what steps he had taken to acquire the Quinlan evidence before trial and how those steps amounted to due diligence.[101] Finally, Aspenwood noted that the district court had already found—more than once—that Chuck could have discovered the Quinlan evidence with due diligence.[102]

In addition to its argument under 60(b)(2), Aspenwood argued that under the principal-broker statute, only the principal broker associated with a sales agent has statutory standing to pursue a commission claim on the agent's behalf.[103] In this case, all testimony—before, during, and after trial—showed that Aspenwood was the principal broker associated with the real estate agent Tim Shea.[104]

Aspenwood also provided testimony and documents refuting Chuck's fraud allegations.[105] This evidence showed that Quinlan never had any right to the Remax Elite dba, that Quinlan ceased functioning as Aspenwood's principal broker seven months

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[98] R. at 7455–58.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] R. at 7465–67.
[104] *Id.*
[105] R. at 7494–96; 7996–8033.

before the FSBO was signed, that Quinlan had left the company roughly 17 months before the interpleader action was amended to add the FSBO commission claim, and that the Remax Elite dba had been registered in the name of Aspenwood Real Estate Corporation and Elite Legacy Corporation.[106]

The court denied Chuck's motion and refused to consider the Quinlan evidence, just as it had the previous three times:

> The Court's observation of this case, from the review of the proceedings up to the point of trial and then during the post-trial process, is that this issue of Mr. Quinlan's ownership of the dba, and his derivative right therefore to effectively control these claims or to transfer them, assign them, or compromise them, is a construct, all of which has occurred after trial. . . . *None of those issues have ever been presented on an evidentiary basis to the Court*, and the Court, in light of both the timing of its presentation, the fact that Mr. Quinlan's involvement, both in the business entity and in the registration of the dba, is a matter of public record that has existed for many years, and questions that the Court has raised with respect to these documents, the Court will simply not countenance the legal argument that Mr. Quinlan is effectively the superseding entity with respect to these claims, and that argument is not given further legal consideration by the Court.[107]

1.3.5 The fifth post-trial Quinlan motion

Over eight months after filing the fourth Quinlan motion, Chuck and Still Standing together filed a "Stipulated" Motion to Release Bond.[108] This motion asserted that Still Standing was the assignee, through Dale Quinlan, of all rights under the FSBO, including the right to pursue the FSBO commission claim.[109] As the purported sole owner of the FSBO commission claims, Still Standing and Chuck had reached a "stipulated"

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[106] R. at 7996–8033.
[107] R. at 8264–65 (emphasis added). Addendum, Ex. D.
[108] R. at 7876–90.
[109] *Id.*

agreement to release Chuck's supersedeas bond.[110] To support this argument, the motion relied on the already-rejected Quinlan evidence and offered that evidence as undisputed fact.[111]

Unsurprisingly, the court denied the motion and refused to consider the Quinlan evidence:

> There have been significant steps taken by the defendant in this case to construct an alternative set of facts which would give Mr. Quinlan certain rights under this judgment and purport to assign those rights to him. None of those have been established properly by the Court, and the findings which were previously made by the Court as to the holders of the claim remain undisturbed. And therefore, Mr. Quinlan does not have authority to act on behalf of the holders of the claim, based upon the Court's denying the request to modify the prior rulings, and therefore is not a proper party with authority to stipulate on issues relating to the bond or any other disposition of the claim. And so that motion is denied.[112]

1.3.6 The sixth post-trial Quinlan motion

One last attempt was made to introduce the Quinlan evidence, this time by Still Standing. In this sixth attempt, Still Standing moved the court to substitute Still Standing as the plaintiff and "true claimholder" under Rule 25.[113] Still Standing filed this motion despite an order from the court entered two days earlier stating that the court would not consider any "alternative set of facts" under which Quinlan might have rights to the judgment in this case, including the capacity to assign rights to others.[114]

The district court refused to depart from its earlier rulings:

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[110] *Id.*
[111] *Id.*
[112] R. at 8245. Addendum, Ex. E.
[113] R. at 8112.
[114] R. at 8245.

> Defendants' Rule 25(c) motion raises an issue essentially identical to an issue that the Defendants have raised previously, i.e. the claim that Still Standing Stables, as the asserted current owner of the dba "Remax Elite," either by assignment from Dale Quinlan or by separate administrative determination by the Department of Corporations, owns the right to control the judgment in this case. *In past hearings, the court has ruled that the evidence and arguments supporting these assertions of Still Standing Stables were not timely brought in this case and are not now properly before the court. The court declines to modify its earlier rulings.*[115]

In short, the district court has never departed from its original ruling on the Quinlan evidence: the evidence is untimely and has never been properly before the court.

1.4 Quinlan's actual involvement with the case and the dba

Aspenwood maintains that no evidence concerning Quinlan was admitted below and therefore cannot be considered here. In addition, Aspenwood notes that Chuck failed to marshal any evidence contradicting his Quinlan claims. Aspenwood provides that evidence here, which Aspenwood offered in opposition to the 60(b) motion.[116] But Aspenwood does not abandon its position that no evidence regarding Quinlan should be considered on appeal and that Chuck's argument fails because he did not marshal any evidence supporting the findings below.

In May 2003, a group including Skip Wing, Shane Thorpe, and Dale Quinlan established Aspenwood Real Estate, LLC, (Aspenwood LLC) a real estate company.[117] Later, sometime in 2004, Aspenwood LLC entered into a franchise agreement with Remax International and received the right to conduct business under the name "Remax

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[115] R. at 8453–54 (emphasis added). Addendum, Ex. F.
[116] R. at 7494–96; 7996–8033.
[117] R. at 7997.

Elite."[118] Aspenwood LLC assigned Quinlan—in his capacity as an Aspenwood LLC employee—to register this dba in the company's name.[119] Quinlan registered the dba, but mistakenly listed himself, rather than Aspenwood LLC, as the dba's owner.[120]

Five months later, in May, 2005, Aspenwood LLC converted to Aspenwood Real Estate Corporation, one of the plaintiffs in this case.[121] At the time of the conversion, Quinlan was serving as Aspenwood's principal broker.[122] Just one month later, however, Quinlan stepped down as principal broker and became Aspenwood's corporate secretary.[123] Skip Wing replaced Quinlan as Aspenwood's principal broker.[124] Shortly after Quinlan ceased serving as Aspenwood's principal broker, Quinlan lost his broker's license.[125] Although Quinlan no longer had a broker license, he continued working for Aspenwood as a real estate agent.[126] This switch from Quinlan to Skip as principal broker occurred roughly eight months before the FSBO and REPC at issue were signed.[127] Quinlan's loss of his broker's license occurred roughly seven months before the FSBO and REPC at issue were signed.[128]

A few months after Quinlan shifted from principal broker to corporate secretary,

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[118] *See* R. at 7999–8000.
[119] R. at 8000.
[120] *Id.*
[121] R. at 7997–98.
[122] *Id.*
[123] R. at 7998, ¶¶ 10–11.
[124] *Id.*
[125] *Id.*
[126] Skip became the principal broker in June 2005, the FSBO and REPC were signed in or around February 2006.
[127] Quinlan lost his broker's license in July 2005, the FSBO and REPC were signed in or around February 2006.
[128] R. at 8000, ¶ 18.

Aspenwood negotiated with Remax International to establish a new Remax franchise in South Ogden.[129] During the due diligence process, Remax International discovered that the Remax Elite dba had been registered in Quinlan's name.[130] Remax International required that this mistake be corrected before it would agree to authorize another Remax franchise.[131]

To correct the mistake, Aspenwood gave Quinlan, in his capacity as corporate secretary, the assignment to fix the incorrect registration.[132] Quinlan attempted to do so by sending a letter to the Division of Corporations and Commercial Code (DCCC).[133] In his letter, Quinlan asked DCCC to transfer ownership of Aspenwood Real Estate Corporation itself to Shane Thorpe, stating that "Aspenwood Real Estate is DBA RE/MAX ELITE."[134] The letter was ineffective because it attempted to transfer ownership of Aspenwood Real Estate, not ownership of the Remax Elite dba.

So Quinlan sent a second letter.[135] This letter got it right, instructing DCCC to transfer the Remax Elite dba from Quinlan to Aspenwood Real Estate.[136] In this letter, Quinlan stated that "RE/MAX Elite is the DBA for Aspenwood Real Estate Corp."[137] DCCC made the requested change and the Remax Elite dba was officially registered in

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] R. at 8001–02.
[133] *Id.*
[134] R. at 8001; 8028.
[135] R. at 8001; 8030.
[136] *Id.*
[137] *Id.*

Aspenwood Real Estate's name on March 9, 2006.[138] This transfer occurred roughly one month after the FSBO and REPC at issue were signed. After the transfer was complete, Remax International authorized Aspenwood to establish a new Remax franchise in addition to Remax Elite.[139]

In December of that year, one month after this case was first filed as an interpleader, Quinlan sold his ownership interest in the company.[140] Although Quinlan was no longer an owner, he continued to work for Aspenwood as a ground-level real estate agent.[141] One month after Quinlan sold his ownership interest in Aspenwood, the Remax Elite name was transferred one more time, this time by Aspenwood Real Estate to Elite Legacy Corporation, another plaintiff in this action.[142]

Three months after that, Quinlan left his agent position with Aspenwood.[143] From that time on, Quinlan had nothing to do with Aspenwood Real Estate or Elite Legacy.[144] He took no files or clients with him.[145] He also never claimed—until a year after the trial in this case—that he had a right to the Remax Elite dba.[146] And he has yet to claim an interest in any of Aspenwood's many other commissions earned under the name Remax Elite.

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[138] R. at 7734.
[139] R. at 8001.
[140] R. at 7999.
[141] *Id.*
[142] R. at 8032.
[143] R. at 7999.
[144] *Id.*
[145] *Id.*
[146] *Id.*

1.5 Skip Wing, the principal broker actually associated with the FSBO

In contrast to the untimely, post-trial Quinlan evidence, the evidence produced at trial established that Skip Wing was the principal broker associated with the failed real estate transaction and that Skip's real estate brokerages owned the Remax Elite dba. Evidence of this was admitted without objection at trial, where Skip Wing testified that he was Remax Elite's principal broker[147] and that the Remax Elite dba belonged to his brokerages (the plaintiffs Aspenwood Real Estate Corporation and Elite Legacy Corporation).[148] In addition, Tim Shea (the real estate agent who signed the FSBO) testified at trial that he worked for Remax Elite and that Skip Wing was Remax Elite's principal broker.[149]

In contrast, no party attempted to introduce evidence at trial showing that Aspenwood did not own the Remax Elite dba, that the Remax Elite dba was not properly registered, or that Skip Wing was not the principal broker associated with Tim Shea. Indeed, Chuck's own counsel throughout trial constantly referred to Remax Elite and the Aspenwood Plaintiffs interchangeably, including referring to Skip Wing as Remax Elite's principal broker.[150] At one point Chuck's counsel even proposed a jury instruction that referred to Skip Wing as Remax Elite's broker.[151]

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[147] R. at 8384, pp. 163:15–17, 183: 12–15.
[148] R. at 8384, pp. 164:19–165:21; *see also* R. at 8384, p. 172:5–12.
[149] R. at 8385, pp. 87:15–88:2.
[150] *E.g.*, R. at 8384, 149: 24–150:5, 153:5–12, 172:5–7, 174:3–9, 178: 12–13; 8385, pp. 64:16–19, 65:22–66:1; 8387, pp. 78:16–79:5, 82:12–18, 83:2–6, 91:22–92:4, 92:14–16.
[151] R. at 8384, p. 67:8–19.

SUMMARY OF ARGUMENT

I. Chuck's arguments fail on threshold grounds.

Chuck's standing argument fails because there is no evidence available on appeal to support it and Chuck has not appealed the exclusion of that evidence. Chuck's remaining arguments fail because Chuck failed to raise them below.

II. Aspenwood has standing.

At this stage of litigation, Chuck may establish that Aspenwood does not have standing only if no evidence exists to support Aspenwood's standing. Evidence was introduced at trial showing that Skip Wing was the proper principal broker to bring the claim and that the plaintiffs were operating under the properly registered Remax Elite dba. No conflicting evidence was offered until nearly a year after trial, and the district court deemed the evidence untimely and refused to consider it. As a result, substantial evidence establishes that Aspenwood has standing, no conflicting evidence exists, and Chuck's standing argument fails.

III. The district court did not abuse its discretion in denying the 60(b) motion.

Chuck's arguments for relief under Rule 60(b) are merely extensions of his standing argument. Like the standing argument, these arguments fail because there is no evidence available to support them. And even if the Quinlan evidence is considered, the district court did not abuse its discretion for three reasons: 1) the Quinlan evidence is irrelevant—Aspenwood has statutory standing even if Quinlan owned the dba; 2) evidence regarding Quinlan must be evaluated in the light most favorable to Aspenwood, and the evidence establishes that Quinlan had no right to the Remax Elite dba and had no

involvement in this case whatsoever; and 3) at best, the Quinlan evidence establishes only that the FSBO parties acted under the mistake of fact that Aspenwood owned the Remax Elite dba.

ARGUMENT

I. Chuck's appeal fails on threshold grounds.

A. The Quinlan evidence is not available on appeal.

Chuck's appeal fails because it relies on unavailable evidence. Under Utah law, evidence that is not considered by the district court cannot be considered on appeal.[152]

In this case, Chuck's appeal relies wholly on the Quinlan evidence. His entire brief presupposes that the Quinlan evidence was admitted below and that the Quinlan evidence is available on appeal. Indeed, without the Quinlan evidence, Chuck's arguments make no sense: He cannot claim that only Quinlan has standing, that Quinlan settled the FSBO commission claim, and so on if the available evidence does not even mention Quinlan. And the available evidence does not mention Quinlan. As far as this appeal is concerned, Dale Quinlan does not exist. Evidence regarding Quinlan was not even offered below until Chuck and others tried—at least six times—to admit the Quinlan evidence, beginning a year after trial.[153] The district court refused to consider it—every time.

Because the district court never considered the Quinlan evidence, Chuck cannot

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[152] *Pilcher v. Dep't of Soc. Servs.*, 663 P.2d 450, 453 (Utah 1983) ("Matters not admitted in evidence before the trier of fact will not be considered here.") (citing *Corbet v. Corbet*, 472 P.2d 430, 433 (1970) ("On Appeal to this court we review the judgments and orders appealed from on the basis of the record upon which the trial court acted, and do not permit the supplementing of our record with matters not before the trial court.")).

[153] *See* pp. 7–20, *supra*.

turn to that evidence on appeal. Without this foundational evidence, Chuck's appeal collapses. Each and every argument depends on the unavailable Quinlan evidence and therefore Chuck's appeal fizzles from the start.

B. Chuck did not preserve his arguments for appeal.

Chuck's arguments on appeal look nothing like his arguments in the lower court. Arguments not raised in the lower court will not be considered for the first time on appeal.[154]

In the lower court, Chuck argued for relief under Rule 60(b)(4), (5), and (6), using the same argument under each subsection: The Quinlan evidence shows that Quinlan owned the Remax Elite dba when the FSBO was signed. The FSBO names "Remax Elite" as the party entitled to a commission. As a result, Quinlan, not the Aspenwood Plaintiffs, was a party to the FSBO and is therefore entitled to the commission.[155]

That was it.

On appeal, this argument has nearly disappeared—of the 36 pages in Chuck's brief, Chuck's discussion of 60(b)(4), (5), and (6) fills 2 pages.[156] Chuck provided only a single paragraph per subsection.

Instead of raising the argument he actually made in the lower court, Chuck now focuses on Rule 60(b)(3).[157] Chuck devotes page after page to revealing what he now considers an elaborate scheme to prevent him from discovering the Quinlan evidence. He

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[154] *L.G. v. State*, 2015 UT 41, ¶ 9, 353 P.3d 131 (internal quotations and citations omitted).
[155] *See* pp. 12–16, *supra*.
[156] Br. of Appellant, 34–36.
[157] *Id.*, 26–34.

also provides new legal arguments citing previously unreferenced cases, statutes, and regulations regarding his diligence in discovering the Quinlan evidence, the legal effect of actions by DCCC, and due process concerns.[158] These arguments were not provided to the district court and the district court had no opportunity to rule on them. Consequently, Chuck cannot raise them on appeal.

II. Aspenwood has standing to maintain this action.

A. Chuck's standing argument may prevail only if no evidence supports the Plaintiffs' claim to standing.

The Utah Supreme Court declared in 2010 that challenges to standing must be evaluated using the standard for a dispositive motion at the relevant stage of litigation.[159] At this stage of litigation (i.e., after a jury trial has been held, a verdict returned, and a final judgment entered), the appropriate dispositive motion is a motion for judgment notwithstanding the verdict.[160] Therefore Chuck's challenge to Aspenwood's standing must be evaluated under the standard for a motion for judgment notwithstanding the verdict.[161]

A motion for judgment notwithstanding the verdict may be granted only if no substantial evidence supports the verdict and the losing party is entitled to judgment as a

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[158] For example, material presented here but not in the lower court includes additional allegations of fraud (Br. of Appellant, 28–29); arguments, statutes, and administrative rules regarding adjudicative proceedings by UDCC (Br. of Appellant, 22–24); and case law regarding fraud through partial disclosure (Br. of Appellant, 30–31).
[159] *Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 15, 228 P.3d 747.
[160] Utah R. Civ. P. 50(b); *see also Koer v. Mayfair Mkts.*, 431 P.2d 566, 568–69 (Utah 1967).
[161] *Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 15.

matter of law.[162] All evidence and reasonable inferences that support the verdict must be accepted as true, while conflicting evidence must be disregarded.[163]

In addition, the evidence must be taken as it existed *at the close of trial*,[164] and appellate courts give deference to factual determinations that affect standing.[165] And, contrary to Chuck's assertion that Aspenwood has the burden to establish standing,[166] once the judgment against Chuck was entered, the burden of demonstrating a lack of standing shifted to Chuck.[167]

In this case, the standing argument fails because substantial evidence was introduced at trial showing that Aspenwood has standing. The witnesses Skip Wing and Tim Shea both testified that Skip was Remax Elite's principal broker, thus satisfying the requirement in Utah Code § 61-2f-305 that the principal broker bring the lawsuit.[168] And while no testimony was offered to show the registration required by § 42-2-6.6, this registration can be reasonably inferred from Skip's testimony that Aspenwood owned the Remax Elite dba and was operating as Remax Elite.[169] Chuck's own counsel referred to Aspenwood throughout trial as Remax Elite and stated that Skip Wing was Remax Elite's

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[162] *Hansen v. Stewart*, 761 P.2d 14, 17 (Utah 1988); *Koer v. Mayfair Mkts.*, 431 P.2d at 568–69.
[163] *Koer v. Mayfair Mkts.*, 431 P.2d at 568–69.
[164] *Franklin v. Stevenson*, 1999 UT 61, ¶ 7, 987 P.2d 22 ("[T]he evidence must be taken as it existed at the close of the trial . . . .") (quoting *Townsend v. United States Rubber Co.*, 392 P.2d 404 (N.M. 1964)).
[165] *Jones v. Barlow*, 2007 UT 20, ¶ 10, 154 P.3d 808 (internal citations omitted).
[166] Br. of Appellant, 27.
[167] *Miles v. Miles*, 2011 UT App 359, ¶ 6, 269 P.3d 958 (internal citation omitted).
[168] R. at 8384, pp. 163:15–17, 183: 12–15; 8385, pp. 87:15–88:2.
[169] R. at 8384, pp. 164:19–165:21. Pretrial evidence also showed that Aspenwood had properly registered the Remax Elite dba. R. at 2167–68

principal broker.[170] In contrast, no evidence was offered at trial to suggest that Aspenwood did not own or had not properly registered the Remax Elite dba.

Indeed, Chuck did not even *attempt* at trial to offer evidence showing that Skip Wing was not Remax Elite's principal broker, that the Remax Elite dba was not properly registered, or that some other party was the true owner of the Remax Elite dba.[171] Nothing was preventing Chuck from introducing this evidence. Chuck simply abandoned his standing argument—voluntarily—once the current plaintiffs were added to the case.

As a result, where all trial evidence supports the conclusion that Aspenwood has standing and no contrary evidence was offered, Chuck's standing argument fails. This is true despite Chuck's efforts to introduce "newly discovered" evidence nearly a year after trial.

B. The district court deemed untimely and did not consider evidence on standing offered for the first time nearly a year after trial.

Standing is a jurisdictional matter that can be raised at any time, including after trial or on appeal.[172] But evidence supporting a standing argument may be excluded as untimely.[173] And evidence that the district court did not consider cannot be considered on

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[170] *E.g.*, R. at 8384, pp. 149: 24–150:5, 153:5–12, 172:5–7, 174:3–9, 178: 12–13; 8385, pp. 64:16–19, 65:22–66:1; 8387, pp. 78:16–79:5, 82:12–18, 83:2–6, 91:22–92:4, 92:14–16.

[171] *See* p. 24, *supra*.

[172] *Sonntag v. Ward*, 2011 UT App 122, ¶ 2, 253 P.3d 1120.

[173] *See Cabaness v. Thomas*, 2010 UT 23, ¶¶ 49–51, 232 P.3d 486 (explaining that district courts have broad discretion to admit or exclude evidence, including evidence the court deems untimely) (internal citations omitted).

appeal.[174] In this case, Chuck's standing argument relies entirely on evidence that the district court deemed untimely and refused to consider. Thus, while standing is an argument that cannot be waived, Chuck in effect waived his Quinlan argument by failing to timely offer supporting evidence.

The Dale Quinlan issue first surfaced nearly a year after trial, when Chuck began attempting to introduce evidence related to Quinlan's purported ownership of the Remax Elite dba. This Dale Quinlan evidence purported to establish that Quinlan, not Aspenwood, was the true owner of the Remax Elite dba (and therefore Quinlan, not Aspenwood, was somehow entitled to the FSBO commission).

Chuck and Still Standing clearly realized that the Quinlan evidence was crucial to their standing argument—in total, Chuck, Still Standing, or both together submitted six post-trial motions asking the court to consider the Quinlan evidence.[175]

In each instance, the district court absolutely refused to consider the Quinlan evidence. In doing so, the court found several times that this evidence could have been discovered with due diligence—findings that Chuck has not appealed.[176]

In the end, despite Chuck's tenacity, the court never considered any evidence that would contradict the facts established at trial: Skip Wing was Remax Elite's principal broker and was entitled to seek a commission. This is a fatal flaw in Chuck's argument.

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[174] *Pilcher v. Dep't of Soc. Servs.*, 663 P.2d 450, 453 (Utah 1983) ("Matters not admitted in evidence before the trier of fact will not be considered here.") (citing *Corbet v. Corbet*, 472 P.2d 430, 433 (1970) ("On Appeal to this court we review the judgments and orders appealed from on the basis of the record upon which the trial court acted, and do not permit the supplementing of our record with matters not before the trial court.")).

[175] *See* pp. 7–20, *supra*.

[176] *See* pp. 7–11, *supra*.

The Quinlan evidence—which Chuck's standing argument relies upon entirely—may not be considered on appeal. Without any supporting evidence, Chuck's standing argument necessarily fails.

C. With due diligence Chuck would have discovered the Quinlan evidence.

As the trial court noted, it is "beyond belief" that Chuck could not have found the Quinlan evidence with due diligence.[177] While the Quinlan evidence has ballooned into all manner of purportedly important documents, one alleged fact lies at the argument's core: the Remax Elite dba was registered in Quinlan's name when Shea and Chuck signed the FSBO. Therefore, under Chuck's reasoning, Quinlan was "Remax Elite" when the FSBO was signed, the FSBO identifies Shea's employer as "Remax Elite," and as a result Quinlan was a party to the FSBO and the only party with standing to pursue a commission. This argument, which continued throughout all six Quinlan motions, relies on that one fact, a fact that Chuck could have discovered with due diligence.

Chuck had ample opportunity to discover that the dba was registered in Quinlan's name—an opportunity that Aspenwood could not have obstructed, even if it wanted to. As Chuck mentions in his Opening Brief, the status of the Remax Elite dba "vexed the entire litigation."[178] Indeed, Chuck began investigating the status of the Remax Elite dba—including its registration documents—as early as December, 2009.[179]

Chuck investigated the Remax Elite registration documents to support his argument that the plaintiff "Remax Elite" was violating the assumed-name statute. Chuck

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[177] R. at 7013. Ex. A.
[178] Br. of Appellant, 9.
[179] *See* pp. 5–6, *supra*; R. at 1451.

asked the court several times to dismiss the case asserting that because the Remax Elite dba was not properly registered with the state "Remax Elite" was prohibited from maintaining a lawsuit.

To support his claim that the Remax Elite dba was not properly registered, Chuck looked up the dba's registration documents on file with the Utah Department of Commerce. He offered several of these documents as exhibits to establish the dba's registration status. It is beyond belief that during his review of the dba's registration documents, Chuck would not have come across the document showing registration in Quinlan's name.

And if Chuck did not find that document, he should have. Where the status of the Remax Elite dba "vexed the entire litigation"[180] Chuck should have—at the very minimum—taken a careful look at the dba's actual registration documents. This information was a matter of public record. Chuck did not need permission from Aspenwood, the discovery process, a court order, or any other assistance to obtain the information.

In other words, the core fact underlying the Quinlan arguments was readily available to Chuck throughout the entire litigation. And even though the dba's status was central to Chuck's pretrial arguments, Chuck either did not review the dba registration documents thoroughly or simply did not discern at the time the arguments he began raising a year after trial.

To be sure, Chuck has elaborated on his Quinlan argument, beginning in his

[180] Br. of Appellant, 9.

second post-trial Quinlan motion. He argues not only that Quinlan owned the Remax Elite dba when the FSBO was signed, but that Quinlan never transferred his interest in that dba to Aspenwood. According to Chuck, this means that Aspenwood is in violation of the assumed-name statute and that this violation cannot be cured.

But this and all other derivative Quinlan arguments necessarily stem from the purportedly critical fact that Quinlan originally registered the dba in his name. This information has always been publicly available. If Chuck missed it, despite years of litigation dedicated to resolving the status of the Remax Elite dba, he cannot complain now.

D. Aspenwood's post-trial evidence directly refuted the Dale Quinlan evidence and corresponding claims.

Even if this Court considers evidence that the district court rejected, that evidence does not demonstrate a lack of standing. At this point in the litigation, evidence supporting Aspenwood's standing must be accepted as true Chuck's while conflicting evidence must be disregarded.[181] But Chuck's brief fails to marshal evidence that was offered to contradict Chuck's Quinlan claims. This evidence, like Chuck's evidence, was not considered below and should not be considered here. But if this Court considers the Quinlan evidence, it must also weigh evidence refuting the Quinlan claim.[182]

Once that refuting evidence is considered, the Quinlan arguments fall flat. In short, Dale Quinlan had nothing to do with this case.[183] It was Aspenwood LLC that purchased

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[181] *Koer v. Mayfair Mkts.*, 431 P.2d 566, 568–69 (Utah 1967).
[182] *See id.*
[183] *See* pp. 20–23, *supra*.

the right to use the Remax Elite name from Remax International. Aspenwood LLC assigned Quinlan, as Aspenwood LLC's agent, to register the Remax Elite dba. Quinlan registered the dba in his own name by mistake.

Remax International discovered this mistake when Aspenwood attempted to secure a second Remax franchise. When Remax International discovered the unacceptable registration, it required that the registration be corrected before it would license another Remax name to Aspenwood. As a result, Aspenwood assigned Quinlan, at this point Aspenwood's corporate secretary, to correct the registration. Quinlan did so. This is confirmed by DCCC documents showing that both Aspenwood Real Estate and Elite Legacy Corporation owned the Remax Elite dba.

In addition, Quinlan has never asserted that he was the principal broker associated with the failed transaction. Nor could he, having lost his principal broker's license seven months earlier. The principal broker actually associated with the FSBO was Skip Wing, which was established by unopposed trial testimony.[184]

To summarize, even if the Quinlan evidence is considered, the remaining evidence establishes that Quinlan had no involvement with the FSBO, that Quinlan could not have been the principal broker associated with the FSBO, and that Quinlan never had a right to the Remax Elite dba. Therefore Chuck's standing argument fails.

E. Even if the untimely evidence is considered, Chuck's arguments fail as a matter of law.

In a derivative Quinlan argument, Chuck asserts that the assumed-name statute

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[184] *See* p. 24, *supra*.

prevents Aspenwood from maintaining this lawsuit. According to Chuck, the Remax Elite dba either has expired or belongs to Still Standing.[185] Even if Chuck has not waived this argument and some evidence exists that Quinlan owned the dba, that Aspenwood did not properly register the dba, or that Still Standing now owns the dba, Chuck's argument still fails, for four reasons:

1. Aspenwood has statutory standing to pursue the commission claim.
2. The assumed-name statute does not bar Aspenwood from maintaining this action.
3. Any failure to properly register the dba can still be cured.
4. Public policy does not allow cases to be dismissed based on evidence offered nearly a year after trial.

1. Aspenwood has statutory standing to pursue the commission claim.

Even if Quinlan owned or if Still Standing currently owns the Remax Elite dba, Aspenwood still has standing to pursue the commission under the principal-broker statute. Under that statute, when a real estate agent earns a commission, the agent cannot pursue the commission on its own—only the agent's principal broker may pursue the commission: "Any action for the recovery of a fee, commission or other compensation may only be instituted and brought by the principal broker *with whom the sales agent or associate broker is affiliated.*"[186]

The real estate agent in this case was Tim Shea. Thus, under the principal-broker statute only "the principal broker with whom [Tim Shea] is affiliated" could institute an

[185] Br. of Appellant, pp. 25–26.
[186] Utah Code Ann. § 61-2f-409(2)(b) (2015) (emphasis added).

action to recover the commission.

In this case, the principal broker affiliated with Shea was Skip Wing.[187] Skip's status as Shea's principal broker was established early on in this case, mostly as a result of Chuck's efforts to have the case dismissed. Chuck tenaciously maintained that only Skip Wing could maintain this lawsuit because Skip was Shea's principal broker. Chuck even went so far as to assert as undisputed fact in a summary judgment motion that Skip was Shea's principal broker. This undisputed fact was confirmed at trial by testimony from both Skip and Shea that Skip was Shea's principal broker. Chuck's own counsel repeatedly referred to Skip at trial as the principal broker.

Shea's principal broker certainly wasn't Quinlan. Quinlan lost his principal broker license in July, 2005—seven months before Shea signed the FSBO.[188] Quinlan continued to work for Aspenwood, but only as a ground-level real estate agent, just like Shea. This fact alone eliminates Quinlan as the principal broker affiliated with Shea. And if Quinlan was not the principal broker "with whom [Tim Shea] is affiliated," Quinlan has no standing to pursue Shea's commission.[189]

In addition, Quinlan's purported ownership of the Remax Elite dba does not, as Chuck asserts, somehow automatically make Quinlan the only possible principal broker associated with the transaction or the "true FSBO contracting party." According to Chuck, because Quinlan owned the Remax Elite dba and because the FSBO listed "Remax Elite" as a contracting party, the FSBO was actually a contract between Chuck

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[187] *See* p. 24, *supra*.
[188] *See* p. 21, *supra*.
[189] Utah Code Ann. § 61-2-18 (now § 61-2f-409(2)(b)).

and Quinlan.[190] This assertion relies on an inaccurate legal assumption, i.e., that naming a person in a contract automatically makes that person a party to the contract.[191]

In other words, even if "Remax Elite" means Quinlan, Quinlan does not automatically become a party to the FSBO simply because the FSBO mentions "Remax Elite." No evidence in this case—including Quinlan's own affidavit—suggests that Quinlan was even aware of the deal or that Shea was acting on Quinlan's behalf. Instead, it is undisputed that Shea worked for Aspenwood and that Skip Wing was Shea's principal broker. If Shea improperly identified Aspenwood as "Remax Elite" in the FSBO, that does not mean that Shea was ineffectually attempting to bind Quinlan to a contract Quinlan didn't even know existed. Instead, it would mean only that all parties executing the transaction did so under the mistake of fact that "Remax Elite" meant Aspenwood.[192]

If Chuck had raised this argument timely, the jury could have—and surely would have based on the undisputed facts—reformed the transaction documents to say "Aspenwood Real Estate Corporation" rather than "Remax Elite."

In short, whether the dba registration was in Quinlan's name or not is irrelevant. Shea earned the commission, and Aspenwood was Shea's principal broker. Under the principal-broker statute, Aspenwood has standing to pursue the commission.

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[190] Br. of Appellant, 16.
[191] *E.g., Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 27, 989 P.2d 1077 stating that an agreement is not binding on a party without that party's acceptance.
[192] *E.g., England v. Horbach,* 944 P.2d 340, 343 (Utah 1997) stating that contractual provisions may be reformed upon mutual mistake of contracting parties.

2. The assumed-name statute does not prevent Aspenwood from maintaining this lawsuit.

The assumed-name statute requires a party conducting business under an assumed name to properly register that name before the party may maintain judicial proceedings.[193] This statute does not apply to Aspenwood because Aspenwood is not conducting business under an assumed name.

Clearly Aspenwood conducted business in the past under the assumed name Remax Elite. This was established by testimony at trial. But the Aspenwood plaintiffs no longer conduct any business at all: Skip Wing is retired and Aspenwood and Elite Legacy ceased operating years ago.[194] Where the assumed-name statute applies only to parties actively conducting business, and where the Aspenwood plaintiffs no longer conduct business, the assumed-name statute does not apply to the Aspenwood plaintiffs.

More importantly, the pretrial and trial evidence supports the conclusion that Aspenwood properly maintained its dba during all times that Aspenwood was conducting business under the name Remax Elite.[195] This includes proper registration at the time this lawsuit was initiated.[196] But once Aspenwood ceased conducting business as Remax Elite, the assumed-name statute no longer required Aspenwood to properly register the Remax Elite dba.

This analysis comports with the assumed-name statute's purpose: to notify the

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[193] Utah Code Ann. § 42-2-10 (2015).
[194] R. at 1092; 1483–85; 2153; 8384, p. 164:13–18.
[195] R. at 2167–68; 8384, pp. 163:15–17, 164:19–165:21, 183: 12–15; 8385, pp. 87:15–88:2.
[196] *See* R. at 2167–68.

public who owns the business and protect those who transact business with the underlying owner.[197] The Remax Elite dba was properly registered during all times that Aspenwood was conducting business, and therefore all parties conducting business with Aspenwood—including Chuck—had notice concerning the use of the assumed name. Once Aspenwood shut down, there was no longer a need to protect persons transacting business with Aspenwood (since no business was being transacted at all), and thus no longer a need to register the Remax Elite dba.

Chuck might counter this argument by suggesting that Aspenwood continues to conduct business as Remax Elite because Aspenwood is still involved in this litigation. Indeed, the term "dba Remax Elite" does follow each plaintiff's name in the captions of Aspenwood's pleadings.[198] But this defect—if it is a defect—can be cured through a simple instruction to the district court to remove "dba Remax Elite" from the captions.[199] This simple remedy would clarify that the Aspenwood plaintiffs are not conducting business under an assumed name and are not maintaining this lawsuit under an assumed name.

In *Graham v. Davis County*,[200] an unincorporated environmental watch-dog committee sued a government agency over alleged GRAMA violations.[201] The complaint was filed in the committee's name, but the committee later amended the complaint to

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[197] *Putnam v. Indust. Comm'n*, 14 P.2d 973 (Utah 1932).
[198] *Graham v. Davis County Solid Wast Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, 979 P.2d 363.
[199] 1999 UT App 136, 979 P.2d 363.
[200] *Id.*, ¶¶ 1–4, 8.
[201] *Id.*, ¶ 8.

make Mr. Graham, a committee member, the plaintiff.[202] The agency argued that the committee's original complaint was void because the committee had not complied with the assumed-name statute.[203]

The Utah Court of Appeals acknowledged that the original complaint was defective because the unregistered committee violated the assumed-name statute.[204] But the Court held that the amendment allowing Graham to replace the committee as plaintiff cured the violation.[205] As a result, the Court rejected the agency's jurisdictional argument based on the assumed-name statute.[206]

Like the amendment in *Graham*, an amendment to the Complaint in this case would cure any violation of the assumed-name statute. As a matter of law, the Aspenwood Plaintiffs cannot violate the assumed-name statute if they are not conducting business under the assumed name "Remax Elite" and are not maintaining this lawsuit under that name.[207] This is true even if Quinlan owned the Remax Elite dba and sold it to Still Standing.

Moreover, the statute requires only that "the provisions of [the assumed-name] chapter are complied with" before a party may maintain a lawsuit.[208] If the Quinlan evidence is considered on appeal and accepted as true, that evidence would establish that the provisions of the chapter have been complied with (i.e., the Remax Elite dba is

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[202] *Id.*, ¶ 4.
[203] *Id.*, ¶ 8.
[204] *Id.*, ¶¶ 13–15.
[205] *Id.*, ¶ 16.
[206] *Id.*
[207] Utah Code Ann. § 42-2-10 (2015).
[208] *Id.*

registered and active). And if the provisions of the assumed-name chapter are complied with, the statute is satisfied and allows Aspenwood to maintain its case.

3. Any failure to comply with the assumed-name statute may be cured.

Even if this Court considers the untimely Quinlan evidence and determines that Still Standing owns the Remax Elite dba, Aspenwood can still cure this defect by recovering and properly registering the Remax Elite dba. The recovery process would require time and possibly another round of litigation (the last thing this lawsuit needs). But Still Standing's claim to the Remax Elite dba would not withstand judicial scrutiny, for two reasons: 1) Still Standing's registration of Remax Elite violates the assumed-name statute; and 2) even if Quinlan owned the Remax Elite dba, Quinlan had no right to transfer it to Still Standing.

The Utah Code does not allow Still Standing to register the Remax Elite dba if the dba is misleading regarding Still Standing's business purpose.[209] And the name Remax Elite applied to Still Standing is certainly misleading. The name "Remax Elite" implies that the underlying entity is a real estate brokerage and a Remax International franchisee. Still Standing is obviously not a real estate brokerage and no evidence exists to show that Still Standing is a Remax International franchisee. As a result, Still Standing's use of the Remax Elite dba is misleading and § 42-2-6.6(1)(a) prevents Still Standing from maintaining that dba.

In addition, Dale Quinlan had no right to assign the Remax Elite dba to Still

[209] *See* Utah Code Ann. § 42-2-6.6(1)(a) (2015).

Standing.[210] Aspenwood negotiated with and purchased the right to use the Remax Elite name from Remax International. All rights associated with the Remax Elite name belonged to Aspenwood. Indeed, when Remax International discovered that Quinlan was mistakenly listed as the owner of the Remax Elite name, it immediately required that Aspenwood correct this mistake.

In short, Still Standing claims that it owns the Remax Elite dba, but that claim has never been tested. If Aspenwood is forced to use the judicial system to reclaim and re-register the Remax Elite dba, it can and will do so. Thus, even if the assumed-name statute currently prevents Aspenwood from maintaining this lawsuit, Aspenwood can cure this defect, making Chuck's argument moot.

4. Public policy does not allow final judgments to be reversed based on untimely evidence.

As a public policy matter, Chuck's standing argument should not be considered. Dismissing a case based on evidence that was readily available but not offered until nearly a year after trial sets horrible precedent. Such precedent would disregard the fundamental protections afforded by the judicial process, including the opportunity to request documents from opposing parties and to depose adverse witnesses.

Here, Aspenwood has not had these vital protections: Aspenwood had no opportunity to cross-examine Dale Quinlan, to depose him, to compel his appearance as a witness, or to subpoena documents from him or from the State of Utah that might undermine Chuck's new evidence. Quinlan has never appeared in any proceeding in this

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[210] *See* pp. 20–23, *supra*.

case, before, during, or after trial. Aspenwood's lack of opportunity to contest the Quinlan evidence is prejudicial because the Quinlan evidence leaves critical questions unanswered:

- Does UDCC have authority to unilaterally reassign ownership of a dba? No rules or regulations were ever cited to the district court suggesting that the Department of Corporations has this authority.
- Who requested the reassignment?
- What was the basis for the decision to reassign?
- Did UDCC give notice to potentially affected parties?
- Did affected parties, including Aspenwood, have an opportunity to be heard?
- Who made the final decision to reassign the dba, and was that person a fair, neutral decision maker?

The Quinlan evidence does not answer these questions. As a result, dismissing this case relying upon the incomplete Quinlan evidence amounts to a violation of Aspenwood's due process rights.

In addition, allowing untimely evidence concerning standing renders "final judgments" forever unstable. If litigants can dismiss already-decided cases based on newly discovered standing evidence, virtually every case ever decided remains up in the air. Surely the judicial system does not allow such a result. Litigation must end sometime, and final judgments should be just that—final.[211]

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[211] *See Kelley v. Kelley*, 2010 UT App 236, ¶ 60, 9 P.3d 171 (emphasizing public interest in putting an end to litigation and preserving final judgments).

III. The district court did not abuse its discretion in denying the 60(b) motion.

A district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion and is "rarely vulnerable to attack."[212] District courts receive broad discretion because 60(b) rulings "are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review."[213]

This admonition applies here: the district court observed over eight years of litigation, including Chuck's beyond-relentless litigation strategy, Chuck's opportunity to discover the Quinlan evidence, Chuck's tendency to submit what the district court called "cumulative and unnecessary motions,"[214] and Chuck's allegations of fraud. Counsel cannot hope to even remotely re-create that experience. A case this convoluted does not lend itself to appellate review, justifying the broad discretion afforded to the district court.

A. The district court did not abuse its discretion under 60(b)(3).

Chuck did not preserve this argument for appeal. While Chuck's Rule 60 motion listed fraud under 60(b)(3) as a ground for relief, Chuck's supporting memorandum and oral argument did not provide any argument, analysis, or citation to authority asserting that relief from judgment was appropriate under Rule 60(b)(3).[215] Instead, Chuck asserted fraud as justification for the timeliness of the motion only. Because Chuck did not request

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[212] *Fisher v. Bybee*, 2004 UT 92, ¶ 7, 104 P.3d 1198 (internal citations omitted).
[213] *Id.*
[214] R. at 7012.
[215] *See* pp. 12–13, *supra*.

relief under 60(b)(3), both the district court's oral ruling and written order did not address it. As a result, Chuck has not preserved for appeal the argument that he is entitled to relief from judgment under Rule 60(b)(3).[216]

Even if he had raised the argument, the district court did not abuse its discretion under 60(b)(3) because no fraud occurred in connection with Dale Quinlan. As explained in Section II, Part D, Quinlan had nothing to do with this case.[217] Once all the evidence regarding Quinlan is considered, it becomes apparent that Quinlan registered the dba in his name by mistake and that Aspenwood owned the right to the dba through a franchise agreement with Remax International.

In other words, Chuck's suggestion that Aspenwood somehow deceived him regarding Quinlan's involvement is inaccurate: Quinlan had no association with the FSBO, was not the principal broker associated with the FSBO, had no right to the Remax Elite dba, and did not own an interest in or even work for Remax Elite at the time depositions and discovery were conducted. Indeed, the trial court expressly ruled that even if the Quinlan evidence was considered, at best this would mean that Quinlan held the dba for Aspenwood's benefit.[218]

In addition, as described in Section II, Part C, it is beyond belief that Chuck could not have discovered the Quinlan evidence had he exercised due diligence during the years that the litigation focused on the status of the Remax Elite dba.

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[216] *L.G. v. State*, 2015 UT 41, ¶ 9, 353 P.3d 131 (internal quotations and citations omitted).
[217] *See* pp. 20–23, *supra*.
[218] R. at 8241–42. Ex. C.

The district court observed all of this and rejected Chuck's allegations of fraud—six times. Where the district court is best positioned to evaluate such fact-sensitive matters, this Court should defer to the district court's judgment.

B. The district court did not abuse its discretion under 60(b)(4) or 60(b)(5).

Chuck's arguments under Rule 60(b)(4) and 60(b)(5) arguments merely continue his Quinlan-based standing argument and therefore fail for the same reason: No evidence regarding Quinlan was admitted by the court and all properly admitted evidence suggested that Aspenwood owned the commission claim and had standing to pursue that claim. Moreover, Chuck has not asserted that the district court erred in excluding the Quinlan evidence or committed clear error in finding that Chuck could have discovered the evidence with due diligence. Consequently, the district court did not abuse its discretion in denying Chuck's Quinlan arguments where no Quinlan evidence was considered.

Further, even if this Court considers the Quinlan evidence, the district court still did not abuse its discretion under 60(b)(4) or 60(b)(5), for three reasons: Aspenwood is the proper party to bring the claim under the principal-broker statute and any ownership Quinlan had in the Remax Elite dba was for Aspenwood's benefit.

First, as explained in Section II, Part E(1), under the Utah principal-broker statute, only the principal broker "with whom the sales agent or associate broker is affiliated" may sue to recover a commission.[219] It is undisputed that the sales agent's principal broker was Aspenwood. No evidence—including the Quinlan evidence—suggests that

[219] Utah Code Ann. § 61-2f-409(2)(b) (2015).

Quinlan was the principal broker associated with Shea when the FSBO was signed. Indeed, such a suggestion would be impossible—Quinlan relinquished his principal broker status seven months before Shea signed the FSBO.

Second, even if Quinlan owned the Remax Elite dba, he did so only as an agent for Aspenwood and for Aspenwood's benefit.[220] As the district court pointed out, after a final judgment, all facts must be construed in favor of that judgment.[221] Indeed, the court ruled that the Quinlan could be construed in a way supporting the judgment: Quinlan registered and held the Remax Elite dba in his role as an agent of the company Aspenwood Real Estate and for Aspenwood's benefit.[222] Where even the Quinlan evidence can be viewed in a light that supports the final judgment, that evidence does not establish that relief was appropriate under 60(b)(4) or 60(b)(5) and the district court did not abuse its discretion in denying the motion under those subsections.

Third, as explained in Section II, Part E(1), the Quinlan evidence—at best—establishes only that the FSBO parties signed it under the mistake of fact that "Remax Elite" meant Shea's employer, Aspenwood.[223]

C. The district court did not abuse its discretion under 60(b)(6).

In the lower court, Chuck made three arguments under Rule 60(b)(6): First, Chuck should be allowed to "supplement earlier motions with testimony from Dale Quinlan to explain why the Seller's side was damaged by the conduct of an incompetent agent and

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[220] *See* pp. 11–12, *supra.*
[221] R. at 8238–39 (Ex. C); 8264; *see also Koer v. Mayfair Mkts.*, 431 P.2d 566, 568–69 (Utah 1967).
[222] *See* pp. 11–12, *supra.*
[223] *See* p. 10, *supra.*

broker."[224] Second, Chuck argued that the judgment should be dismissed based on Quinlan's failure to mediate.[225] Finally, Chuck argued that earlier rulings regarding mediation and an assignment agreement should be corrected in light of the Quinlan evidence.[226]

The argument on appeal abandons these three arguments. Instead, Chuck now combines arguments he makes in other places: Aspenwood violated the principal-broker statute, Aspenwood violated the assumed-name statute, and Aspenwood concealed Quinlan during discovery.[227] Chuck asserts that these considerations together justify relief under 60(b)(6).

But because Chuck did not present this argument in connection with 60(b)(6) below, he cannot do so here.[228] Further, Chuck raises these arguments elsewhere in his appeal and they should be considered on their merits there.

REQUEST FOR ATTORNEY FEES

Aspenwood was awarded its attorney fees against Chuck in the lower court. If Aspenwood prevails on appeal, it is entitled to fees reasonably incurred on appeal.[229]

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[224] R. at 7318.
[225] R. at 7319.
[226] *Id.*
[227] Br. of Appellant, 35–36.
[228] *L.G. v. State*, 2015 UT 41, ¶ 9, 353 P.3d 131 (internal quotations and citations omitted).
[229] *Dillon v. S. Mgmt. Corp.*, 2014 UT 14, ¶ 61, 326 P.3d 656.

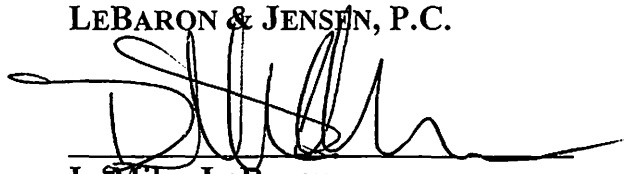
CONCLUSION

The district court saw the Quinlan issue for what it was: an unpersuasive, untimely attempt to introduce evidence that Chuck could have discovered years earlier. Where Rule 60 motions are generally "saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review"[230] this Court should defer to the district court's observation that it is "beyond belief" that Chuck could not have discovered the Quinlan evidence with due diligence.

For this reason, and because even with consideration of the Quinlan evidence the trial court did not abuse its broad discretion, Aspenwood respectfully requests that the district court be affirmed.

DATED and SIGNED this 16th day of October, 2015.

LEBARON & JENSEN, P.C.



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[230] *Miles v. Miles*, 2011 UT App 359, ¶ 6, 269 P.3d 958 (internal citations omitted).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 12,635 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

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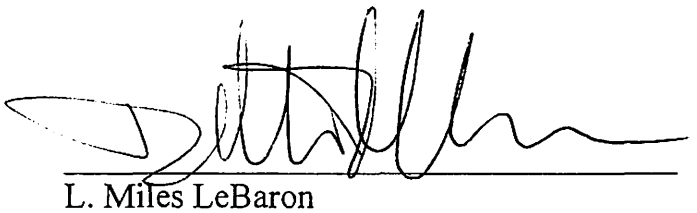

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Dated: October 16, 2015

CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the foregoing *Brief of Appellees* to be served via first class U.S. mail, postage pre-paid, to the following:

Karra J. Porter (#5223)
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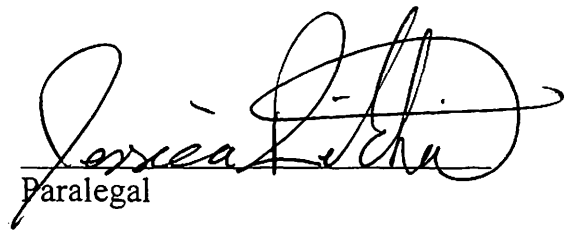

Paralegal

ADDENDUM

EXHIBIT A: Excerpt from Ruling and Order on Chuck's Motion to Dismiss (first ruling refusing to consider Dale Quinlan evidence)

EXHIBIT B: Ruling and Order on Motion to Dismiss based on Settlement Agreement (second ruling refusing to consider Dale Quinlan evidence)

EXHIBIT C: Excerpt from Ruling and Order on Defendants' Rule 52(b) Motion (third ruling refusing to consider Dale Quinlan evidence)

EXHIBIT D: Excerpt from Ruling and Order on Defendants' Rule 60(b) Motion (fourth ruling refusing to consider Dale Quinlan evidence)

EXHIBIT E: Excerpt from Ruling and Order on Defendants' Stipulated Motion to Release Bond (fifth ruling refusing to consider Dale Quinlan evidence)

EXHIBIT F: Ruling and Order on Defendants' Rule 25(c) Motion (sixth and final ruling refusing to consider Dale Quinlan evidence)

EXHIBIT A

Excerpt from Ruling and Order on Chuck's Motion to Dismiss
(first ruling refusing to consider Dale Quinlan evidence)

Defendants' Motions to Dismiss/Clarify

On June 25, 2013, Still Standing Stables ("SSS")filed its Motion to Clarify Rulings and Identify Real Parties, and on June 28, 2013, Schvaneveldt filed yet another motion to dismiss for lack of standing and jurisdiction. As both motions were prepared by attorney Robert Fuller and contain similar arguments, the court will address them both here.

At the outset, the court expresses its dismay that Schvaneveldt and SSS continue to raise issues concerning standing after this case has already been through a jury trial and attorney fees have been awarded. Standing is a jurisdictional issue that can be raised at any point during litigation. *Sonntag v. Ward*, 2011 UT App. 122, ¶ 2. This court, however, loses jurisdiction once a final judgment is entered. This court entered a judgment of $212,806.70 against Schvanveldt on January 2, 2013. This case is over. A jury heard the issues, and the court awarded attorney fees to the prevailing parties. Issues regarding standing should have been raised years ago.

The Court acknowledges that Defendants' current motions regarding standing are partially prompted by Plaintiffs' unmeritorious argument that Mr. Wing is not a party subject to liability for the award of attorney fees, but a simple memorandum in opposition to Mr. Wing's Motion to Clarify should have sufficed. This is precisely the type of cumulative and unnessary motion that justified the significant attorney fees awarded in this case, and caused this case to languish on the court's docket for years.

Despite the court's hesitancy to even address Defendants' standing arguments, the court, out of an abundance of caution, will briefly address each of Defendants' arguments.

First, on the basis of "recent discoveries regarding the true ownership of Remax Elite" Schvaneveldt argues that none of the plaintiffs were parties to the FSBO or Real Estate Purchase

Contract ("REPC"), but rather that the dba "ReMax Elite" was registered to Dale Quinlan ("Quinlan") at the time the FSBO and REPC were signed, and that Quinlan never transferred the rights under the agreement to any of the plaintiffs. Raising this question of fact concerning the standing of the plaintiffs at this late date is unwarranted. Utah Rules of Civil Procedure 60(b), governing motions for relief from judgment, is instructive here. It states that relief from judgment based on new evidence is only permissible if (1) the motion is filed within three months after the judgment, and (2) due diligence could not have discovered the new evidence in time for a new trial under Rule 59(b). Judgment against Schvanveldt was entered in January 2013. Further, that judgment was entered based on a jury verdict entered in August 2012. Until this time, all of the parties had agreed that Mr. Wing was the principal broker of ReMax Elite, the contracting party. In fact, Defendants abandoned their previous arguments regarding standing once Mr. Wing was added as a plaintiff. Raising new factual issues nearly a year after a jury trial and six months after entry of judgment will not be permitted. Even if this motion were timely, Schvaneveldt has provided no explanation for why this new evidence could not have been discovered in time for a rule 59(b) motion. This case was filed in 2006, and the issues regarding the commission were first raised in 2008. It is beyond belief that Schvaneveldt could not have discovered this evidence with due diligence.

Even if the court were inclined to consider Schvanveldt's new factual assertions, Schvanveldt's evidence attached to his Motion to Dismiss does not contradict the presumption that has always been present in this case, i.e., that Mr. Wing was the principal broker associated with the FSBO. Schvaneveldt's evidence only shows that the dba Remax Elite was transferred to

Skip Wing a short time after the FSBO and REPC were consummated. It does not show that Quinlan did not assign the claims at some other time.

Schvaneveldt's tries to establish that Quinlan did not transfer his claims to Mr. Wing by submitting his July 8, 2013 "Supplemental Authority and Exhibits in Support of: Motion to Dismiss Commission Claims Based on Lack of Standing and Jurisdiction" containing an affidavit of Dale Quinlan. Dale Quinlan states, "I do not believe nor do I have any recollection of ever assigning any commission agreement or contract rights between myself, doing business under the assumed name REMA ELITE, and the Seller, specified above, to any other individual nor entity." Based on this statement, and his own observations of the signatures, Schvaneveldt argues that a transfer never occurred and the letters of transfer "appear to be phoney documents filed with the State of Utah Division of Corporations with fraudulent intent."

Even if Rule 60(b) did not bar consideration of Quinlan's affidavit, which it does, the court never granted leave for Schvaneveldt to file "Supplemental Authority and Exhibits" and will not consider it, U.R.C.P. 7(c)(1) ("No other memoranda will be considered without leave of court"), except to note that allegations of forgery and fraud are affirmative defenses which must be raised in Defendants' Answer. U.R.C.P. 8. Although Defendants' Answer raised issues of forgery and fraud with respect to the FSBO and REPC, Defendants never raised any such issues pertaining to any Letter of Transfer; accordingly, such arguments are waived.

Second, SSS argues that because Mr. Wing argues in his Motion to Clarify that he was not a party to the FSBO, Mr. Wing lacked standing to sue for the commission. Having rejected Mr. Wing's arguments, however, this issue is moot. The facts and procedural posture of this case are clear. Mr. Wing, as part of the collective "ReMax," sued the defendants for the

commission based on the FSBO, and Mr. Wing is the principal agent of ReMax, that was named as a party to the FSBO. Accordingly, Mr. Wing has standing to assert the commission claim. Defendants nearly admitted as much by abandoning their standing arguments once Mr. Wing was added as a plaintiff.

Third, SSS argues that Elite Legacy Corporation does not have standing to sue because it was not a party to the FSBO and did not exist when the FSBO and REPC were signed. Elite Legacy Corporation and Aspenwood Real Estate Corporation are separate corporate entities that owned the dba ReMax Elite at different times. Both corporations have been plaintiffs in this action ever since the Third Amended Complaint was filed, and both entities were formed by the same principal agent, Mr. Wing. The court sees no value in drawing a distinction between them at this time, when both entities are ultimately controlled by Mr. Wing, who is jointly liable.

Fourth, SSS argues that Aspenwood Real Estate Corporation does not have standing to sue because it assigned its commission cause of action to Tim Shea. Although "ReMax" executed an Assignment containing language purporting to transfer "any and all claims, demands, and causes of action of any kind whatsoever which ReMax has or may have against Still Standing Stables, LLC," to Tim Shea, it is clear that the parties intended for ReMax to retain the right to pursue the commission claim. Specifically, the Assignment states, "Tim's lawyer may represent Tim's interests and act as co-counsel for ReMax in pursuing *ReMax's offensive claim* . . . ." (emphasis added). Further, the Assignment contemplates that Tim Shea did not have the right to bring the commission cause of action, stating ". . . the parties agree that it will be best if Tim prosecutes, collects, settles, compromises, and grants releases in ReMax's name . . . ." Accordingly, the court interprets the Assignment as giving Tim Shea the right to collect the

benefits of the commission claim, minus the first $10,000, and the right to direct the prosecution of the claim, but ReMax retained the right to stand as the formal party asserting the cause of action. This interpretation is strengthened by the timing of the Assignment, September 2008, the same month that this court granted ReMax and Shea's first motion to amend but clarified that only the principal broker could assert the commission claim. Ruling Granting Motion for Leave to Amend, (September 2, 2008).

Lastly, Defendants insist that Aspenwood and Elite Legacy do not have standing because they are defunct corporations, and are not "principal brokers." This is an exact replica of standing arguments asserted years ago, which Defendants abandoned because Mr. Wing was added as a plaintiff. Defendants were wise to abandon this argument after Mr. Wing was added as a party, and they should not have resurrected it here. Because Mr. Wing is the principal of both corporations, and a party to this action, drawing a distinction between them is meaningless.

The parties' requests for a hearing on these matters are denied; oral argument will not assist the court in deciding the issues herein addressed.

Order & Judgment

Accordingly, Defendant Chuck Schvaneveldt's Motion to Dismiss Commission Claims Based on Lack of Standing and Jurisdiction is denied. To the extent that Defendant Still Standing Stable's Motion to Clarify seeks dismissal of Plaintiffs' commission claim, it is denied. To the extent that the parties' seek clarification regarding who is a judgment creditor and who is a judgment debtor, the court finds and rules as follows:

EXHIBIT B

Ruling and Order on Motion to Dismiss based on Settlement Agreement
(second ruling refusing to consider Dale Quinlan evidence)

AUG 13 2013

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

HILARY "SKIP WING, et al., Plaintiffs, vs. STILL STANDING STABLE, L.C., et al., Defendants.	**RULING & ORDER ON MOTION TO DISMISS ALL REMAX ELITE COUNTERCLAIMS BASED ON SETTLEMENT AGREEMENT** Case No. 060906802 Judge Michael D. Lyon

This matter is before the court on Defendants Still Standing Stable, L.C., and Chuck Schvaneveldt's Motion to Dismiss All Remax Elite Counterclaims Based on Settlement Agreement. Pursuant to the following, Defendants' Motion is denied.

Defendants' motion is based entirely on its new theory, based on new evidence, that a third party, Dale Quinlan, is the true owner of Plaintiffs' claim, and that Defendants have settled the matter with Quinlan.

As discussed in this court's July 22, 2013 Ruling and Order on Motions to Clarify and Schvaneveldt's Motion to Dismiss Commission Claims Based on Lack of Standing and Jurisdiction, this court cannot consider new evidence from Defendants after a final judgment unless, pursuant to rule 60(b), the motion is filed within three months after the judgment *and* due diligence could not have discovered the new evidence in time for a new trial under Rule 59(b). Here, judgment against Schvanveldt was entered in January 2013 and all of the claims against

Still Standing Stables have long been dismissed. Further, the January judgment was entered based on a jury verdict entered in August 2012. Accordingly, this motion is untimely.

Even if Defendants' motion was timely, Schvaneveldt has not provided any explanation for why this new evidence could not have been discovered in time for a Rule 59(b) motion. Another fatal flaw to consideration of this new evidence.

Lastly, even if this motion were not time barred and Defendants did have some reasonable excuse why they could not discover this new evidence earlier, settling a claim that could be raised by a third party does not per se indicate that the plaintiffs in this case did not have standing to assert their claims. At best the new evidence would raise a material question of fact concerning proper ownership of the commission claim

The court does not believe that oral argument on this matter will contribute anything to its understanding of the issues or the law. Accordingly, Defendants' request for a hearing is denied.

ORDER

Pursuant to the foregoing, Defendants' Motion to Dismiss All ReMax Elite Counterclaims Based on Settlement Agreement is denied. No further order pursuant to rule 7(f) is required. The court is satisfied that this case is closed.

DATED this 13 day of Aug 2013

Michael D. Lyon
Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of Aug., 2013, I sent a true and correct copy of the foregoing ruling to Plaintiff and Defendant as follows:

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Attorney for Plaintiff

Danielle Rushton
Deputy Court Clerk

EXHIBIT C

Excerpt from Ruling and Order on Defendants' Rule 52(b) Motion
(third ruling refusing to consider Dale Quinlan evidence)

This case was tried with a jury, and so the alternative under Rule 59(a)(4) that the Court is permitted to consider newly discovered evidence, provides that the party bringing the motion can only produce evidence that he could not with reasonable diligence have discovered and produced at the trial.

That is an issue which has been previously addressed, and this Court's ruling is not going to depart from the prior rulings.

And that is, that the information specifically the documentation from the Department of Corporations, and the information contained in that documentation, also challenges with respect to the validity or invalidity of signatures, and whether or not they're forged or have been cut and pasted, all of those kinds of things were information that could, by reasonable diligence, have been discovered and determined well before a trial was conducted in this case.

The record is abundantly clear that these are all public records. They have been available to all of the parties throughout these proceedings.

There have been references to the dba registration during the trial. There is documentation in the record of the Department of Corporations showing registrations in the corporate names of Elite Legacy and Aspenwood Real Estate. Those are all part of the record in the public file, and they were

all available, as well as records including the signature of Dale Quinlan, which would put anyone on notice of his potential interest in those dbas.

And the Court specifically rules that it is under Rule 59 that new evidence may be considered under appropriate circumstances.

In this case, the Court's ruling is that the Rule 59 latitude for modification of findings and conclusions does not apply and is not available. And even if it were available, would not be justified based upon this evidence, which the Court rules is new evidence, which could reasonably have been known prior to the trial being conducted.

With respect to Rule 52, which is the specific focus of the motion, and the motion which the Court has determined to be timely, the Court's ruling is that there is no latitude under Rule 52 to consider new evidence.

The policy underlying Rule 52 is to make sure that the findings and conclusions that are entered in the record are consistent with the record of the trial. And the opportunity to amend or correct, it is the Court's ruling, is an opportunity to ensure consistency with the trial record, not deviate from the trial record based upon consideration of additional evidence which was not considered or presented at trial.

Further, with respect to these particular issues, the Court notes that when a judgment and verdict are entered, particularly when there is a jury

verdict entered, that any construction of the facts which may be considered by the Court requires the Court to construe the facts that are found, consistent with that judgment, and that if there are alternative constructions of the facts that are possible, from the facts as they are presented, the Court is required to construe those facts consistent with the judgment which was entered.

And in this particular case, the Court's ruling with respect to the present motion is that, as has been demonstrated, there is evidence in the record of this trial, which is consistent with the determinations that were made.

There is evidence in the trial in this case, of the registration of the dba in the names Elite Legacy and Aspenwood Real Estate. And while there certainly is documentation with respect to Mr. Quinlan's interest in the dba, the record of the trial, by acknowledgment of movant's counsel is devoid of any reference at all to Mr. Quinlan. And perhaps on that basis alone, it would be inappropriate for this Court to suggest any modification of the finding, to burden those findings with additional information relating to Mr. Quinlan, when none of that information was presented at trial.

Those issues would be issues that may justify a new trial under Rule 59; however that motion is not before the Court today.

They may also possibly be considered under Rule 60 as alternate grounds for relief from judgment, but they do not form a basis for requested modification under Rule 52(b).

Further, the Court will make its ruling with respect to some of the questions relating to the dba.

The Court's ruling is that a dba is an asset. It is a unique and intangible asset, but nonetheless it is an asset.

The arguments of the parties have repeatedly made reference to the dba being owned. That is a reference to its status as an asset, an intangible personal property asset, and the Court rules that a dba is such an asset, and it can be owned.

And a dba, like other assets, may be owned or held or transferred by different parties, under different circumstances, and in different capacities.

The fact that an individual's name is associated with a particular asset does not necessarily mean that it is presumptively established that all rights or attributes of that asset are exclusively held by the individuals in whose name the asset is held.

It is possible, for example, for assets to be held in a representative capacity, or as agents for others.

It is also possible for assets to be held in a somewhat segregated

capacity, where a legal title is held in one particular name, but equitable interests are actually owned by someone else.

There has been nothing suggested in the arguments before the Court that some other alternative explanation of the ownership, or the listings of this asset in the name of Mr. Quinlan, could justify exactly the same record that exists, and support the findings exactly as they were found.

There is evidence, and the evidence has even been discussed, that Mr. Quinlan was a principal broker for one of the business entities that was involved. He may very well have been acting as an agent for that business entity, or his name on that document may be in a representative capacity for that entity.

And the Court is required again to construe the construction of facts to be supportive of the judgment, if such a construction is possible. And the Court rules, in this case, that it is.

With respect to Mr. Quinlan, therefore, the Court finds the argument that simply his appearing on the initial application is conclusive of his ownership interest of all rights associated with that asset, from the time of the original application through the time of the purported assignment to, Still Standing Stable, is simply not a persuasive argument.

And the circumstances of this case, in fact, suggest to the contrary

that he may have been simply functioning in his capacity as a participant in the business entity that owned the dba of Re/Max Elite, when his name was placed on that document.

The Court further notes that many of the entities, Re/Max Elite being one, Elite Legacy being one, Aspenwood Real Estate being one, are all legal fictions. They are not tangible entities. They are not living and breathing. They exist as a bundle of legal rights.

And they may represent individuals, they may represent associations of individuals, they could be represented or effectively owned or controlled by joint ventures or by partnerships. A general partnership can be established by an oral agreement, as can a joint venture.

And all of those are possibilities that could explain the particular name as it appears on the original application, and be entirely consistent with the determinations which had previously been made, and the findings of the Court; and therefore, the Court rules that there has not been a sufficient showing to justify a modification of the findings as they relate to the ownership of the dba.

Further, there has been a request for modification of the findings as it relates to Mr. Skip Wing, based upon his articulation in various statements that he did not individually own or control the rights that were being

asserted in the litigation.

That particular position is not disputed, either in the testimony of Mr. Wing or in the arguments of plaintiff's counsel, and the Court believes that it is appropriate to make a clarification and modification to the existing rulings with respect to that issue.

And that clarification will be that, to the extent that Skip Wing is identified as a party in these proceedings, or as the holder of any claims, that identification is Mr. Skip Wing, in his representative capacity, as principal broker for the brokerage, or as an agent or representative of the brokerage, and does not represent his individual and personal ownership of those claims.

So the Court is not going to modify the findings to the extent of excluding his name, but will include the modification that to the extent that his name is included, that is a representation of his role in connection with the business entity, and that that role was the role of principal broker, representative, agent, or authorized representative of the brokerage.

And that clarification will be made, to avoid any conclusion that the claims that are identified are individually and separately owned by Mr. Wing, independent of his role in connection with the business entity, and that modification will be approved.

EXHIBIT D

Excerpt from Ruling and Order on Defendants' Rule 60(b) Motion
(fourth ruling refusing to consider Dale Quinlan evidence)

made previous rulings on those issues, and those rulings are not going to be disturbed by the Court today. There is evidence that is even before the Court today, including the record of the Department of Corporations, that shows Legacy Elite as a registered owner of the dba during particular time periods. There is documentation that shows Aspenwood Real Estate, either as an LLC or as a corporation, as a registered owner of the dba at various time. There are documents which purport to assign the dba between those entities. There is a document, purportedly signed by Mr. Quinlan, that purports to transfer whatever interest he may have had, whether that was a bare legal title to the dba that was equitably owned by the corporation already, or whether it was something else. That kind of information is not before the Court. But to be consistent with the prior rulings, the Court's ruling today is that the evidence is sufficient to maintain all of the prior rulings of the Court with respect to the issues of standing and ownership of the dba, and those rulings will not be disturbed. The suggestion that all of the documentation now produced, and the arguments now being made, that Mr. Quinlan, in fact, has at all times been the real party in interest, and is the only party that has the right to proceed, are simply not persuasive.

The Court's observation of this case, from the review of the proceedings up to the point of trial and then during the post-trial process, is

that this issue of Mr. Quinlan's ownership of the dba, and his derivative right therefore to effectively control these claims or to transfer them, assign them, or compromise them, is a construct, all of which has occurred after trial. And it is a construct which is based, to a large extent, on a letter, December 11th, 2013, that the Court has previously made reference to, which appears to be a deviation from any recognized practice of the Department of Commerce. It presupposes findings with respect to issues of forgery, or cutting and pasting of documents. None of those issues have ever been presented on an evidentiary basis to the Court, and the Court, in light of both the timing of its presentation, the fact that Mr. Quinlan's involvement, both in the business entity and in the registration of the dba, is a matter of public record that has existed for many years, and questions that the Court has raised with respect to these documents, the Court will simply not countenance the legal argument that Mr. Quinlan is effectively the superseding entity with respect to these claims, and that argument is not given further legal consideration by the Court.

Similarly, the argument with respect to the necessity that the Court determine that the judgment is void because of failure to comply with the requirements of mediation, while there have been suggestions that specific requirements of the mediation rules or statutes may not have technically

been complied with, there's been no indication that there was any objection made at the time, or that these issues were even raised until they have now come up, well after trial, well after the conclusion of that mediation. And again, based upon a construct to some extent which superimposes Mr. Quinlan's purported rights into that process, suggesting that the failure of his participation may also necessarily constitute a failure of the legal sufficiency of the mediation, the Court simply will not consider those arguments, based upon the analysis which has previously been made. And the record before the Court is that a mediation was ordered, and that a mediation was conducted. Whether there were technical deficiencies in that mediation, to this Court's knowledge, they weren't ever brought to the Court's attention in a manner that would have permitted the Court to address deficiencies with respect to the mediation, or, at the time, that would have permitted the parties to also address those particular issues.

There has been nothing argued to the Court on those points, and the Court rules that the argument with respect to the insufficiency of the mediation is not persuasive; therefore, the Court's ruling is that the asserted grounds for relief under Rule 60(b)(4), that the judgment itself is void, are not well taken. That objection to the form of the judgment is overruled, and the motion for relief denied. And I believe that is all of the issues that were

EXHIBIT E

Excerpt from Ruling and Order on Defendants' Stipulated Motion to Release Bond (fifth ruling refusing to consider Dale Quinlan evidence)

The Court denies the motion, which is a purported stipulated motion to release the bond or approve the settlement.

And the basis of the Court's ruling is that the purported stipulation does not properly identify the parties holding the judgment.

There have been significant steps taken by the defendant in this case to construct an alternative set of facts which would give Mr. Quinlan certain rights under this judgment and purport to assign those rights to him. None of those have been established properly by the Court, and the findings which were previously made by the Court as to the holders of the claim remain undisturbed. And therefore, Mr. Quinlan does not have authority to act on behalf of the holders of the claim, based upon the Court's denying the request to modify the prior rulings, and therefore is not a proper party with authority to stipulate on issues relating to the bond or any other disposition of the claim. And so that motion is denied.

ORDER

Based upon the Court's Rulings, it is hereby ordered as follows:

1. The Rule 52(b) Motion is denied with respect to Defendants' attempt to introduce the Dale Quinlan dba evidence post-trial, as there is no latitude under Rule 52 to consider new evidence. The policy underlying Rule 52 is to make sure that the findings and

EXHIBIT F

Ruling and Order on Defendants' Rule 25(c) Motion
(sixth and final ruling refusing to consider Dale Quinlan evidence)

The Order of Court is stated below:
Dated: December 29, 2014 01:33:01 PM /s/ Noel S. Hyde
District Court Judge

L. Miles LeBaron (#8982)

Dallin T. Morrow (#13812)

LEBARON & JENSEN, P.C.

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IN THE SECOND JUDICIAL DISTRICT IN AND FOR WEBER COUNTY, STATE OF UTAH, OGDEN DEPARTMENT

Hilary "Skip" Wing, et al,

Plaintiffs,

vs.

Still Standing Stables, L.C., et al.

Defendants.

Ruling and Order on November 24, 2014 Hearing of Defendants' Rule 25(c) Motion

Civil No. 060906802

Honorable Noel S. Hyde

On November 24, 2014, the Honorable Noel S. Hyde held a hearing on Defendants' Rule 25(c) Motion. Dallin T. Morrow of LeBaron & Jensen, P.C. appeared for the Plaintiffs; Robert J. Fuller appeared for Defendant Chuck Schvaneveldt and Still Standing Stables, L.C.; and Karra J. Porter appeared for Third-Party Defendant Cathy Code.

Ruling

Defendants' Rule 25(c) Motion raises an issue essentially identical to an issue that the Defendants have raised previously, i.e. the claim that Still Standing Stables, as the asserted current owner of the dba "Remax Elite," either by assignment from Dale Quinlan or by separate administrative determination by the Department of Corporations, owns the right to control the judgment in this case. In past hearings, the court has ruled that the evidence and arguments supporting these assertions of Still Standing Stables were not timely brought in this case and are not now properly before the court.

The court declines to modify its earlier rulings. As a result, the court rules that Still Standing Stables' ownership or control of the judgment has not been established, and that the requested substitution under Rule 25(c) is not appropriate.

Order

Based upon the court's ruling, the court orders that Defendants' motion under Rule 25(c) is denied.

----------END OF ORDER----------

In accordance with the Utah State District Courts Efiling Standard No. 4, and URCP Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was submitted for electronic filing, and was thus sent to all counsel of record by email:

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on this __ day of December 2014.

/s/ Jessica Ritchie

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